

## **AGREEMENT FOR EXPERT CONSULTING SERVICES**

**THIS AGREEMENT** is between the Office of the Indiana Attorney General (hereinafter the "State") and FTI Consulting, Inc., whose address is 450 East 96<sup>th</sup> Street, Suite 500, Indianapolis, IN 46240 (hereinafter "Consultant").

### **WITNESSETH**

**WHEREAS**, Consultant has specialized expertise and experience in financial analysis of not for profit corporations and public charitable trusts, and has previously consulted with the State in connection with a dispute between Earlham College and Conner Prairie Farm; and

**WHEREAS**, the State desires to further utilize the services of Consultant for the purposes of aiding in trial preparation and potentially providing expert testimony in the case of *State of Indiana v. Earlham College*, Cause No. 29D03-0401-TR-0009.

**NOW THEREFORE**, in consideration of the premises and the mutual promises herein contained, it is agreed by and between the State and Consultant as follows:

**1. Duties of Consultant.** Consultant shall perform such services incident to preparation for trial as requested from the Attorney General (the "Services"). Such services shall be provided by Consultant as an independent professional. The Services may include preparation for and attendance at depositions, preparation of supplemental reports for use in the Litigation, and possible testimony as an expert witness at trial. The Services are to be performed for the benefit of the State in connection with the Litigation, and are not intended to benefit or influence any other person or entity.

**2. Consideration.** Consultant shall be paid two hundred ninety-five dollars (\$295.00) an hour. Total remuneration under this Agreement shall not exceed twenty thousand dollars (\$20,000.00). Payment to Consultant shall not be dependent upon the findings that it renders, nor on the outcome of the Litigation.

**3. Term.** The term of this Agreement will be from September 20, 2004 to December 31, 2004.

#### **4. Access to Records**

The Consultant shall maintain all books, documents, papers, accounting records, and other evidence pertaining to all costs incurred under this Agreement. Consultant shall make such materials available at all reasonable times during this Agreement term, and for three (3) years from the date of final payment under this Agreement, for inspection by the State or by any other authorized representative of state government. Copies thereof shall be furnished at no cost to the State if requested.

#### **5. Assignment**

The Consultant shall not assign or subAgreement the whole or any part of this Agreement without the State's prior written consent. The Consultant may assign right to receive payments to such third parties as the Consultant may desire without the prior written consent of the State, provided that Consultant gives written notice (including evidence of such assignment) to the

State thirty (30) days in advance of any payment so assigned. The assignment shall cover all unpaid amounts under this Agreement and shall not be made to more than one party.

## **6. Audits**

Consultant acknowledges that it may be required to submit to an audit of funds paid through this Agreement. Any such audit shall be conducted in accordance with IC 5-11-1, and audit guidelines specified by the State.

## **7. Changes in Work**

In the event the State requires a major change in scope, character or complexity of the work after the work has begun, adjustments in compensation to the Consultant shall be determined by the State in the exercise of its good faith and prudent judgment. The Consultant shall not commence any additional work or the change of the scope Services until authorized in writing by the State. No claim for additional compensation shall be made in the absence of a prior written approval executed by all signatories hereto.

## **8. Compliance with Laws**

The Consultant shall comply with all applicable federal, state and local laws, rules, regulations and ordinances, the provisions of which are incorporated by reference. The enactment or amendment of any applicable state or federal statute or the promulgation or regulations thereunder after execution of this Agreement shall be reviewed by the State and the Consultant to determine whether the provisions of this Agreement require formal modification.

## **9. Ownership and Confidentiality of Contractor's Work Papers.**

The Consultant agrees that all information, data, findings, recommendations, proposals, etc. by whatever name described and in whatever form secured, developed, written or produced by the Consultant in furtherance of this Agreement shall be the property of the State. The Consultant shall take such action as is necessary under law to preserve such property rights in and of the State while such property is within the control and/or custody of the Consultant. The Consultant hereby specifically waives and /or releases to the State any cognizable property right of the Consultant to copyright, license, patent or otherwise use such information, data, findings, recommendations, proposals, etc.

## **10. Confidentiality of State Information**

The Consultant understands and agrees that data, materials and information disclosed to Consultant may contain confidential and protected data. Therefore, the Consultant promises and assures that data, material and information gathered, based upon or disclosed to Consultant for the purposes of this Agreement, will not be disclosed to others or discussed with other parties without the prior written consent of the State.

## **11. Conflict of Interest**

### **A. As used in this section:**

"Immediate Family" means the spouse and unemancipated children of the Consultant

"Interested Party" means the Consultant or its Immediate Family.

"Department" means the Indiana Department of Administration.

"Commission" means the State Ethics Commission.

- B. The Department may cancel this Agreement without recourse by Consultant if any Interested Party is an employee of the State of Indiana.
- C. The Department will not exercise its right of cancellation under section B above if the Consultant gives the Department an opinion by the Commission indicating that the existence of this Agreement and the employment by the State of Indiana of the interested party does not violate any statute or code relating to ethical conduct of state employees. The Department may take action, including cancellation of this Agreement, consistent with an opinion of the Commission obtained under this section.
- D. Consultant has an affirmative obligation under this Agreement to disclose to the Department when an interested party is or becomes an employee of the State of Indiana. The obligation under this section extends only to those facts that Consultant knows or reasonably could know.

## **12. Continuity of Services**

The Consultant recognizes that the service(s) to be performed under this Agreement are vital to the State and must be continued without interruption and that, upon expiration, a successor, either the State or another consultant, may continue them. The Consultant agrees to:

1. Furnish phase-in training, and
2. Exercise his best efforts and cooperation to effect an orderly and efficient transition to a successor.

The Consultant shall be reimbursed for all reasonable phase-in, phase-out costs (i.e. costs incurred within the agreed period after Agreement expiration that result from phase-in, phase-out operations).

## **13. Debarment and Suspension**

Consultant certifies, by entering into this Agreement, that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from entering into this Agreement by any federal agency or by any department, agency or political subdivision of the State of Indiana.

## **14. Default by State**

If the State, sixty (60) days after receipt of written notice, fails to correct or cure any breach of this Agreement, then the Consultant may cancel and terminate this Agreement and collect all monies due up to and including the date of termination.

## **15. Disputes**

A. Should any disputes arise with respect to this Agreement, Consultant and the State agree to act immediately to resolve any such disputes. Time is of the essence in the resolution of disputes.

B. The Consultant agrees that, the existence of a dispute notwithstanding, it will continue without delay to carry out all its responsibilities under this Agreement that are not affected by the dispute. Should the Consultant fail to continue to perform its responsibilities regarding all non-disputed work, without delay, any additional costs incurred by the State or Consultant as a result of such failure to proceed shall be borne by the Consultant, and the Consultant shall make no claim against the State for such costs. If the State and Consultant cannot resolve a dispute within ten (10) working days following notification in writing by either party of the existence of a dispute, then the following procedure shall apply:

The parties agree to resolve such matters through submission of their dispute to the Commissioner of the Indiana Department of Administration. The Commissioner shall reduce a decision to writing and mail or otherwise furnish a copy thereof to the Consultant and the State within ten (10) working days after presentation of such dispute for action. The Commissioner's decision shall be final and conclusive unless either party mails or otherwise furnishes to the Commissioner, within ten (10) working days after receipt of the Commissioner's decision, a written appeal. Within ten (10) working days of receipt by the Commissioner of a written request for appeal, the decision may be reconsidered. If no reconsideration is provided within ten (10) working days, the parties may mutually agree to submit the dispute to arbitration for a determination, or otherwise the dispute shall be submitted to an Indiana court of competent jurisdiction.

The State may withhold payments on disputed items pending resolution of the dispute. The unintentional nonpayment by the State to Consultant of one or more invoices not in dispute in accordance with the terms of this Agreement will not be cause for Consultant to terminate this Agreement, and the Consultant may bring suit to collect these amounts without following the disputes procedure contained herein.

## **16. Drug-Free Workplace**

The Consultant hereby covenants and agrees to make a good faith effort to provide and maintain a drug-free workplace. Consultant will give written notice to the State within ten (10) days after receiving actual notice that the Consultant or an employee of the Consultant has been convicted of a criminal drug violation occurring in Contractor's workplace.

False certification or violation of the certification may result in sanctions including, but not limited to, suspension of Agreement payments, termination of this Agreement and/or debarment of contracting opportunities with the State of Indiana for up to three (3) years.

In addition to the provisions of the above paragraphs, if the total Agreement amount set forth in this Agreement is in excess of \$25,000.00, Consultant hereby further agrees that this Agreement is expressly subject to the terms, conditions, and representations of the following certification:

This certification is required by Executive Order No. 90-5, April 12, 1990, issued by the Governor of Indiana. Pursuant to its delegated authority, the Indiana Department of Administration is requiring the inclusion of this certification in all contracts and grants from the State of Indiana in excess of \$25,000.00. No award of a Agreement shall be made, and no Agreement, purchase order or agreement, the total amount of which exceeds \$25,000.00, shall be valid, unless and until this certification has been fully executed by Consultant and made a part of the Agreement or agreement as part of the Agreement documents.

The Consultant certifies and agrees that it will provide a drug-free workplace by:

- A. Publishing and providing to all of its employees a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the Contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
- B. Establishing a drug-free awareness program to inform its employees of (1) the dangers of drug abuse in the workplace; (2) Contractor's policy of maintaining a drug-free workplace; (3) any available drug consulting, rehabilitation, and employee assistance programs; and (4) the penalties that may be imposed upon an employee for drug abuse violations occurring in the workplace;
- C. Notifying all employees in the statement required by subparagraph (A) above that as a condition of continued employment, the employee will (1) abide by the terms of the statement; and (2) notify the Consultant of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- D. Notifying in writing the State within ten (10) days after receiving notice from an employee under subdivision (C)(2) above, or otherwise receiving actual notice of such conviction.
- E. Within thirty (30) days after receiving notice under subdivision (C)(2) above of a conviction, imposing the following sanctions or remedial measures on any employee who is convicted of drug abuse violations occurring in the workplace: (1) taking appropriate personnel action against the employee, up to and including termination; or (2) requiring such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a federal, state or local health, law enforcement, or other appropriate agency; and
- F. Making a good faith effort to maintain a drug-free workplace through the implementation of subparagraphs (A) through (E) above.

**17. Ethics.** The Contractor shall abide by all ethical requirements that apply to persons who have a business relationship with an agency, as set forth in Indiana Code § 4-2-6 et seq., the regulations promulgated thereunder, and Executive Order 04-08, dated April 27, 2004. If the Contractor is not familiar with these ethical requirements, the Contractor should refer any questions to the Indiana State Ethics Commission, or visit the Indiana State Ethics Commission website at <<<<http://www.in.gov/ethics/>>>>. If the Contractor or its agents violate any applicable ethical standards, the State may, in its sole discretion, terminate this contract immediately upon notice to the Contractor. In addition, the Contractor may be subject to penalties under Indiana Code § 4-2-6-12."

#### **18. Force Majeure**

In the event that either party is unable to perform any of its obligations under this Agreement or to enjoy any of its benefits because of natural disaster or decrees of governmental bodies not the fault of the affected party (hereinafter referred to as a "Force Majeure Event"), the party who

has been so affected shall immediately give notice to the other party and shall do everything possible to resume performance. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Agreement.

#### **19. Funding Cancellation**

When the director of the State Budget Agency makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this Agreement, this Agreement shall be canceled. A determination by the Budget Director that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.

#### **20. Governing Laws**

This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana and suit, if any, must be brought in the State of Indiana.

#### **21. Indemnification**

Consultant agrees to indemnify, defend, and hold harmless the State of Indiana and its agents, officials, and employees from all claims and suits including court costs, attorney's fees, and other expenses caused by any act or omission of the Consultant. The State shall not provide such indemnification to Contractor.

#### **22. Independent Contractor**

Both parties hereto, in the performance of this Agreement, shall act in an individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purposes whatsoever. Neither party will assume liability for any injury (including death) to any persons, or damage to any property arising out of the acts or omissions of the agents, employees or subcontractors of the other party.

The Consultant shall be responsible for providing all necessary unemployment and worker's compensation insurance for Contractor's employees.

#### **23. Licensing Standards**

The parties agree that Consultant will comply with all applicable licensing standards, certification standards, accrediting standards and any other laws, rules or regulations governing services to be provided by the Consultant pursuant to this Agreement. The State shall not be required to reimburse Consultant for any services performed when Consultant is not in compliance with such applicable standards, laws, or regulations. If licensure, certification or accreditation expires or is revoked, Consultant shall notify State immediately and the State, at its option, may immediately terminate the contract.

## **24. Nondiscrimination**

Pursuant to IC 22-9-1-10 and the Civil Rights Act of 1964, Consultant shall not discriminate against any employee or applicant for employment in the performance of this Agreement. The Consultant shall not discriminate with respect to the hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment, because of race, color, religion, sex, disability, national origin or ancestry. Breach of this covenant may be regarded as a material breach of Agreement. The Contractor's execution of this Agreement also signifies compliance with applicable federal laws, regulations, and executive orders prohibiting discrimination in the provision of services based on race, color, national origin, age, sex, disability or status as a veteran.

## **25. Notice to Parties**

Whenever any notice, statement or other communication is required under this Agreement, it shall be sent to the following addresses, unless otherwise specifically advised.

### **A. Notice to the State shall be sent to:**

Office of the Attorney General  
Attn: Greg Zoeller  
302 W. Washington Street  
IGCS, 5<sup>th</sup> Floor  
Indianapolis, IN 46204

### **B. Notice and payments to the Consultant shall be sent to:**

FTI Consulting, Inc.  
Attn: Gary Kleinrichert  
450 East 96<sup>th</sup> Street, Suite 500  
Indianapolis, IN 46240

## **26. Order of Precedence**

Any inconsistency or ambiguity in this Agreement shall be resolved by giving precedence in the following order: (1) This Agreement, (2) attachments prepared by the State, and (3) attachments prepared by the Contractor.

## **27. Ownership of Documents & Materials**

All documents, records, programs, data, film, tape, articles, memos, and other materials not developed or licensed by the Consultant prior to execution of this Agreement, but specifically developed under this Agreement shall be considered "work for hire" and the Consultant transfers any ownership claim to the State of Indiana and all such matters will be the property of the State of Indiana. Use of these materials, other than related to Agreement performance by the Consultant, without the prior written consent of the State, is prohibited. During the performance of this Agreement, the Consultant shall be responsible for any loss of or damage to these materials developed for or supplied by the State and used to develop or assist in the services provided herein while the materials are in the possession of the Consultant. Any loss or damage thereto shall be restored at the Contractor's expense. Full, immediate, and

unrestricted access to the work product of the Consultant during the term of this Agreement shall be available to the State.

## **28. Payments**

All payment obligations shall be made in arrears in accordance with Indiana law and state fiscal policies and procedures.

## **29. Penalties/Interest/Attorney's Fees**

The State will in good faith perform its required obligations hereunder and does not agree to pay any penalties, liquidated damages, interest, or attorney's fees, except as required by Indiana law, in part, IC 5-17-5, IC 34-54-8, and IC 34-13-1.

Notwithstanding the provisions contained in IC 5-17-5, the Parties stipulate and agree that any liability resulting from the State of Indiana's failure to make prompt payment shall be based solely on the amount of funding originating from the State of Indiana and shall not be based on funding from federal or other sources.

## **30. Progress Reports**

The Consultant shall submit progress reports to the State upon request. The report shall be oral, unless the State, upon receipt of the oral report, should deem it necessary to have it in written form. The progress reports shall serve the purpose of assuring the State that work is progressing in line with the schedule, and that completion can be reasonably assured on the scheduled date.

## **31. Renewal Option**

This Agreement may be renewed under the same terms and conditions subject to the approval of the Commissioner of the Department of Administration and the State Budget Director in compliance with IC 5-22-17-4. The term of the renewed Agreement may not be longer than the original agreement. Exercise of this option is at the sole discretion of the State and is not subject to agreement or acceptance by the Consultant.

## **32. Severability**

The invalidity of any section, subsection, clause or provision of this Agreement shall not affect the validity of the remaining sections, subsections, clauses or provisions of this Agreement.

## **33. Substantial Performance**

This Agreement shall be deemed to be substantially performed only when fully performed according to its terms and conditions and any modification thereof.

## **34. Successors and Assignees**

The Consultant binds its successors, executors, administrators, and assignees to all covenants of this Agreement. Except as above set forth, the Consultant shall not assign, sublet or transfer interest in this Agreement without the prior written consent of the State of Indiana.



### **35. Taxes**

The State of Indiana is exempt from state, federal and local taxes. The State will not be responsible for any taxes levied on the Consultant as a result of this Agreement.

### **36. Termination for Convenience**

This Agreement may be terminated, in whole or in part, by the State whenever, for any reason, the State determines that such termination is in the best interest of the State. Termination of Services shall be effected by delivery to the Consultant of a Termination Notice at least five (5) days prior to the termination effective date, specifying the extent to which performance of Services under such termination becomes effective. The Consultant shall be compensated for services properly rendered prior to the effective date of termination. The State will not be liable for Services performed after effective date of termination. The Consultant shall be compensated for Services herein provided but in no case shall total payment made to the Consultant exceed the original consideration set forth in paragraph 2, above.

### **37. Travel**

Expenditures made by the Consultant for travel will be reimbursed by the State at the current rate paid by the State of Indiana and upon pre-approval by the State. Travel expenses can only be reimbursed in accordance with the State Travel Policies and Procedures. Out-of-state travel requests must be reviewed by the State for availability of funds and for appropriateness per Circular guidelines.

### **38. Waiver of Rights**

No right conferred on either party under this Agreement shall be deemed waived and no breach of this Agreement excused, unless such waiver or excuse is in writing and signed by the party claimed to have waived such right.

### **39. Work Standards**

The Consultant shall execute its responsibilities by following and applying at all times the highest professional and technical guidelines and standards. If the State becomes dissatisfied with the work product of or the working relationship with those individuals assigned to work on this Agreement, the State may request in writing the replacement of any or all such individuals and Consultant shall grant such request.

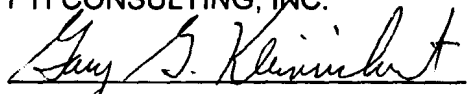
**The rest of this page is left blank intentionally.**

### Non-Collusion and Acceptance

The undersigned certifies under penalties of perjury that s/he is the duly authorized representative, agent, or officer of the Consultant, that s/he has not, nor has any other employee, representative, agent, or officer of the Consultant, directly or indirectly, to the best of his or her knowledge, entered into or offered to enter into any combination, collusion, or agreement to receive or pay, and that s/he has not received or paid any sum of money or other consideration for the execution of this Agreement other than that which appears upon the face hereof.

**IN WITNESS WHEREOF**, Consultant and the State of Indiana have, through duly authorized representatives, entered into this Agreement. The parties having read and understand the foregoing terms of this Agreement do by their respective signatures dated below hereby agree to the terms thereof.

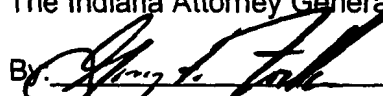
FTI CONSULTING, INC.



Printed Name: Gary G. Kleinrichert

Date: 9/22/04

The Indiana Attorney General

By:  (for)

Title: CEO

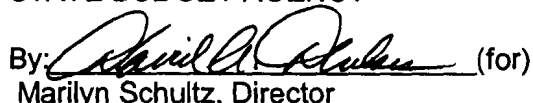
Date: 10/7/04

Approved:  
DEPARTMENT OF ADMINISTRATION

By:  (for)  
Charles Martindale, Commissioner

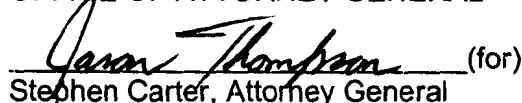
Date: Oct. 17, 2004

Approved:  
STATE BUDGET AGENCY

By:  (for)  
Marilyn Schultz, Director

Date: 10/20/04

Approved as to Form and Legality:  
OFFICE OF ATTORNEY GENERAL

 (for)  
Stephen Carter, Attorney General

Date: 10-21-04

183288